(2) Supreme Court, U.S.
FILED
001651 APR 30 2001
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

NORTHERN LIGHTS CLUB, 641271 ALBERTA, LTD., d/b/a NORTHERN LIGHTS CLUB, AND JEFFREY K. BURGAR,
Petitioners

v.

NORTHERN LIGHT TECHNOLOGY, INC.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The First Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI (VOLUME I) -

ERIC C. GRIMM
Counsel of Record
CYBERBRIEF, PLC
320 SOUTH MAIN STREET
SECOND FLOOR
ANN ARBOR, MI 48104
734.332.4900
FAX 734.332.4901

42 pp

TABLE OF CONTENTS

Page

(VOLUME I)

Appendix A – Opinion of the Court of Appeals.
Northern Light Technology v. Northern Lights Club,
236 F.3d 57, 57 U.S.P.Q.2d 1277
(1st Cir. Jan. 8, 2001). 1a

Appendix B – Order of Court of Appeals Denying Petition
for Rehearing and Suggestion For Rehearing *En Banc*,
Northern Light Technology, Inc. v. Northern Lights Club,
No. 00-1641 (1st Cir. Jan. 30, 2001). 20a

Appendix C – 15 U.S.C. § 1125 ..... 21a

Appendix D – Fed. R. Civ. P. 4 ..... 30a

(VOLUME II)

Appendix E – Opinion of the District Court.
Northern Light Technology v. Northern Lights Club,
97 F. Supp. 2d 96 (D. Mass. Mar. 31, 2000). ... 41a

Appendix F (Optional) – CD-ROM Submission,
Accepted for Filing Under Local Rule 32.1 of the
U.S. Court of Appeals for the First Circuit ..... (opt.)

[Appendix F shall be submitted separately,
accompanied by a Motion for Leave to File, and
shall be included as an Appendix only with leave].

Appendix A.

United States Court of Appeals
For the First Circuit

No. 00-1641

NORTHERN LIGHT TECHNOLOGY, INC.,
Plaintiff, Appellee,
v.
NORTHERN LIGHTS CLUB, JEFFREY K. BURGAR, AND
641271 ALBERTA LTD., D/B/A NORTHERN LIGHTS CLUB,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Douglas P. Woodlock, U.S. District Judge]

Before
Selya, Boudin and Stahl,
Circuit Judges.

Eric C. Grimm, with whom CyberBrief, PLC, Theodore A. Lund, and Gaeta, Courville & Lund, were on brief for appellant.

Bernard J. Bonn, III, with whom Barry S. Pollack, and Dechert Price & Rhoads, were on brief for appellee.

January 8, 2001

STAHL, Circuit Judge. This case involves a dispute over the simultaneous use of two similar Internet domain names by two separate entities. Defendants-appellants Northern Lights Club, Jeff Burgar and 641271 Alberta Ltd. (collectively "Northern Lights" or "defendants") appeal a preliminary injunction entered by the district court requiring the posting of a specified disclaimer on their World Wide Web site's portal page. The court entered the injunction after finding that plaintiff-appellee Northern Light Technology, Inc. ("Northern Light" or "plaintiff") was likely to prevail on the merits of its state and federal trademark claims and its claim under the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) ("ACPA").

Defendants assert three bases for relief in this interlocutory appeal: (1) that the district court lacks personal jurisdiction, and hence the power to enjoin them; (2) that the district court erred in concluding that the plaintiff was likely to succeed on the merits of its claims; and (3) that the injunction currently in place is overly broad and consequently infringes their free-speech rights. Finding that the district court properly acquired jurisdiction over defendants when their agent was served with process within the forum state, and discerning no basis for disturbing the district court's determination on the likely success of plaintiff's suit, we uphold the district court's issuance of a preliminary injunction. And because defendants only obliquely pressed their First Amendment argument before the district court, we decline to decide the issue for purposes of this appeal.

a. Background

The facts of this case are extensively chronicled in the district court's opinion, see Northern Light Tech., Inc. v. Northern Lights Club, 97 F. Supp. 2d 96 (D. Mass. 2000), and so we confine our discussion to the events relevant to this appeal. On September 16, 1996, plaintiff registered the Internet domain name northernlight.com with Network Solutions, Inc. ("NSI"), which at that time was the organization exclusively

entrusted with the task of registering domain names on the World Wide Web.[1] Plaintiff also filed registration papers for the "Northern Light" service mark with the United States Patent and Trademark Office ("PTO") during that same month.[2] Nearly a year later, in August 1997, plaintiff began its operation of the northernlight.com website (and, consequently, its use of the "Northern Light" mark in commerce) as a search engine. Search engines are popular Web-retrieval tools that match a search query submitted by an Internet user with the websites whose content best corresponds to the submitted search terms. The northernlight.com site has remained in continuous existence as a search engine since August 1997.

Defendant Jeff Burgar, a resident of High Prairie, Alberta, Canada, is the president and principal shareholder of 641271 Alberta, Ltd., an Alberta corporation that owns the northernlights.com domain name. Burgar, a self-described "Internet entrepreneur," has, since the mid-1990s, registered thousands of "catchy" domain names – i.e., Internet addresses appropriating, in identical or slightly modified form, the names of popular people and organizations. He is also the president of Northern Lights Club, an unincorporated association with a listed address in Las Vegas, Nevada. While Northern Lights Club's stated mission is to bring together devotees of the Northern Lights, or aurora borealis, including businesses that take their name from the famous celestial phenomenon,

---

[1]As they are commonly used today, Internet domain names serve two principal functions: (1) providing the addresses for hypertext markup language ("HTML") sites on the World Wide Web, and (2) permitting the dissemination of e-mail accounts with a common suffix that reflects the identity of the accounts' proprietor.

[2]The PTO issued plaintiff a registered trademark for "Northern Light" on February 23, 1999.

Burgar's testimony indicates that the club has no actual individual members.

In October 1996, approximately one month after plaintiff registered its northernlight.com website, Burgar, on behalf of Northern Lights Club, registered the northernlights.com domain name with NSI.[3] Soon after registration, Burgar licensed the name to FlairMail, a vanity e-mail service that he manages and that is owned by a local Alberta newspaper.[4] Burgar "believes" that this newspaper is owned by his wife. Under this arrangement with FlairMail, defendants offered e-mail accounts under the northernlights.com domain name that users could access through some other website, such as flairmail.com, although Internet users who attempted to visit the northernlights.com page on the World Wide Web would find that no such site existed.[5]

The two similar domain-name registrations enjoyed a peaceful coexistence until March 2, 1999, when a USA Today story on Internet search engines erroneously identified plaintiff's website as northernlights.com. After ascertaining that defendants were the owners of this domain name, plaintiff's marketing director contacted Burgar to find out whether defendants might be interested in selling it. The parties exchanged a series of proposals and counterproposals by e-mail

---

[3]Plaintiff does not allege that defendants had actual knowledge of the northernlight.com registration when they registered the northernlights.com domain name.

[4]Vanity e-mail permits a subscriber to choose both the user name and the domain name for their e-mail address. To use as an example the service offered by defendants, an admirer of the aurora borealis named John Doe could choose the vanity e-mail address "John.Doe@northernlights.com."

[5]The district court found, at the time of its March 2000 opinion, that approximately 112 individuals used the northernlights.com domain name as part of their vanity e-mail address. See 97 F. Supp. 2d at 101.

over a two-month period but ultimately no sales or licensing agreement was consummated. Soon thereafter, in April 1999, defendants posted an active page on the northernlights.com World Wide Web site. Visitors to the site saw, among other things, a site-search function near the top of the screen that enabled users to perform a search of the northernlights.com site for specific words or phrases, as well as links to FlairMail and other members of the "Northern Lights Community." Plaintiff's Web site was placed third in the list of the Northern Lights Community "Business Listings."[6] Plaintiff had not agreed to this listing.

On July 14, 1999, plaintiff sent Burgar a cease-and-desist letter, demanding that the northernlights.com site be deactivated. Defendants chose not to respond to this letter. Fifteen days later, plaintiff asked NSI to strip defendants of the northernlights.com domain name based on the similarity of their respective marks, but NSI declined, citing the one-letter discrepancy between the name of defendant's website and plaintiff's trademark. On August 6, 1999, plaintiff filed the instant lawsuit under federal and state theories of unfair competition, trademark infringement, and trademark dilution. In its complaint, plaintiff sought both a temporary restraining order and a preliminary injunction. In December 1999, plaintiff amended its complaint to add a claim under ACPA (which had been enacted into law less than one month earlier) and to abandon its federal trademark-dilution claim and its state-law claims of unfair competition and trademark dilution.

Moments before the district court hearing on September 1, 1999 to consider the merits of plaintiff's claims and the court's personal jurisdiction over defendants, plaintiff's agent

---

[6]Plaintiff asserts that it received approximately 300 referrals per day from defendants' site about the time that the northernlights.com site went online, and that this number later increased to several thousand referrals per day.

physically served process upon Burgar, who had traveled voluntarily to Boston from Alberta to witness the proceedings and to make himself available for testimony if needed. Although the hearing itself focused largely on the convoluted issues of personal jurisdiction arising from Internet activities, it also touched upon the merits of plaintiff's request for preliminary injunctive relief. At the end of the hearing, the district court indicated that it would issue a temporary restraining order modifying the content of the northernlights.com site to prevent further public confusion, and solicited advice from both parties as to the appropriate substance of that order.

True to its word, the district court imposed the TRO the following day, stating that Northern Light had successfully demonstrated probable personal jurisdiction, that it would be likely to succeed in its trademark-infringement suit, and that the balance of hardships and the public interest favored temporary relief. The court ordered that defendants remove all content from the northernlights.com site and post in its place a blacked-out screen containing only an image of the aurora borealis and links to three websites: (1) flairmail.com (where users could access their northernlights.com e-mail accounts); (2) plaintiff's northernlight.com site; and (3) the content page that formerly existed at northernlights.com, to be described, for purposes of the link, as "BUSINESSES THAT ARE LISTED WITH THE NORTHERN LIGHTS COMMUNITY." On the same day that this ruling was issued, the parties jointly moved the court for a continuance of "at least 60 days." In this joint motion, defendants acquiesced in an extension of the restraining order against them until discovery and further hearings in the matter were conducted, and the parties agreed to a schedule governing the completion of discovery and the filing of any additional motions. The court granted this motion, and both parties submitted further motions during this period. After granting several motions for extensions of time, the district court

ultimately held hearings on January 19 and 21, 2000 on the personal-jurisdiction issue and the merits of plaintiff's request for preliminary relief.

In its written opinion issued on March 31, 2000, the district court ordered, inter alia, that what had become a de facto preliminary injunction should remain in place.[7] In so doing, the court began by holding that it had personal jurisdiction over defendants.[8] It determined that plaintiff had satisfied sections 3(c) and 3(d) of the Massachusetts Long-Arm Statute, see Mass. Gen. Laws ch. 223A, § 3, because defendants had likely caused tortious injury to plaintiffs in Massachusetts, both through their acts within the Commonwealth (in the form of their trademark-infringing website) and their regular solicitation of business through acts outside of the Commonwealth (by virtue of, inter alia, the site's "entice[ment]" to users to post material). See 97 F.Supp.2d at 104-06. The court also found that defendants had sufficient contacts with Massachusetts to support the exercise of specific jurisdiction under International Shoe Co. v. Washington, 326 U.S. 310 (1945), thereby satisfying the

---

[7]The record does not clearly reveal when the TRO became a preliminary injunction. At some point following the submission of their joint motion for continuance, the parties (and the district court) started describing the TRO as a preliminary injunction. Furthermore, in its written opinion, the district court stated that the preliminary injunction already in place would not be modified. In any event, the present appeal clearly is from a preliminary injunction.

[8]The district court noted that its decision was responsive to a plethora of pretrial motions pending before it, including motions to dismiss for lack of personal jurisdiction and for failure to state a claim; plaintiff's initial motion for a preliminary injunction; defendants' motions for reconsideration of the temporary relief that had already been ordered; and the parties' motions to compel discovery and to impose sanctions. See 97 F. Supp. 2d at 98.

constitutional due-process element of personal jurisdiction. See Northern Light, 97 F.Supp.2d at 106-08.

On the merits of plaintiff's suit, the district court found that, based on the likelihood of confusion between the two websites because of their similar form and function, plaintiff's state and federal trademark-infringement and unfair-competition causes of action would probably succeed. See id. at 109-15, 120. The court further opined that plaintiff was likely to succeed on its ACPA claim, based on the confusing similarity of the two domain names and proof of defendants' bad-faith intent to profit from plaintiff's northernlight.com mark. See id. at 115-20. On the latter issue, the court reasoned that, although Burgar's initial reluctance to sell the northernlights.com site and defendants' uninterrupted use of the northernlights.com name for vanity e-mail accounts militated against a bad-faith finding, defendants' historical practice of "targeting trademarked names, creating fictional entities to register them, and offering dubious explanations for the selection of these domain names" ultimately tipped the scales in favor of such a preliminary determination. Id. at 119. Finally, the district court found that plaintiff had established a likelihood of irreparable harm, that the balance of hardships favored the plaintiff, and that the public interest favored the preservation of the preliminary injunction already in place. See id. at 120-21.

On appeal, defendants dispute the district court's personal-jurisdiction ruling and aspects of its decision regarding the likelihood of plaintiff's success on the merits. Defendants also pursue their argument, not expressly considered by the district court, that the present injunction unduly burdens their First Amendment rights.

II. Personal Jurisdiction

Defendants first challenge the injunction entered by the district court on the ground that the court was without personal jurisdiction to order such a remedy. At each stage of the proceedings, the parties have contested whether defendants'

activities, both in terms of the content of their website and their discussions with the plaintiff regarding a potential business venture, meet the personal-jurisdiction criteria of the Massachusetts Long-Arm Statute and the requirements of due process. Plaintiff also posited a more conventional basis for personal jurisdiction in the district court – namely, the service of process effected upon Burgar just prior to the September 1, 1999 preliminary injunction hearing. We afford plenary review to the district court's determination of personal jurisdiction, and may affirm its judgment for any independent reason supported by the record. See, e.g., Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999).

The district court expressly declined to consider the validity of personal jurisdiction based on physical service of process. See 97 F. Supp. 2d at 108 n.12. On appeal, however, plaintiff continues to press its case that, under the doctrine of transient jurisdiction, it has satisfactorily created jurisdiction through its service of process on Burgar prior to the September 1, 1999 hearing. See Burnham v. Superior Court of Cal., 495 U.S. 604 (1990) (plurality opinion); Schinkel v. Maxi-Holding, Inc., 565 N.E.2d 1219, 1222-23 (Mass. App. Ct. 1991) (holding that personal jurisdiction in Massachusetts need not be predicated on Long-Arm Statute when defendant served with process while in forum under transient-jurisdiction doctrine). Defendants dispute this proposition, claiming that this method of service of process is fundamentally unfair in that it represents a trap for the unwary litigant who travels to the forum state solely to contest the issue of personal jurisdiction. Defendants also argue that permitting service of process under these circumstances is unwise from a public-policy perspective in that it discourages the litigant from actively assisting the district court in the jurisdictional- discovery process.

Although they do not specifically ask for process immunity, defendants' argument against personal jurisdiction essentially boils down to a request that Burgar be deemed immune from

service of process since, at the time he was served, he was present in Massachusetts only for the purpose of attending a personal-jurisdiction hearing in this lawsuit. This argument enjoys some measure of historical pedigree, albeit in a related context. Long before the Supreme Court in Burnham affirmed that personal jurisdiction can be sustained against a defendant solely on the basis of his presence in the forum state at the time of service of process, it had recognized that some parties temporarily in the forum state enjoy immunity from service by virtue of their status as participants in ongoing litigation. For instance, in Lamb v. Schmitt, 285 U.S. 222 (1932), the Court noted the potential peril of allowing an individual who is attending a proceeding in one suit to be served with process in conjunction with another:

> [T]he due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation.

Id. at 225 (internal citations omitted). Similarly, Justice Scalia's plurality opinion in Burnham referred to several states' historical imposition of statutory or common-law prohibitions on the service of process of those individuals present in the forum as parties or witnesses in unrelated judicial proceedings – a practice that led him to conclude that transient jurisdiction comported with constitutional due process. See 495 U.S. at 613.

Accompanying the courts' repeated recognition of the validity of the party/witness immunity exception, however, has been a persistent acknowledgment of the exception's limitations. The Lamb Court itself noted that, because the privilege exists for the convenience of the district court in its exercise of judicial administration, rather than to protect the individual seeking to avoid service of process, courts enjoy the

discretion to confer (or deny) immunity in such instances. See 285 U.S. at 225 (citing Stewart v. Ramsay, 242 U.S. 128, 130 (1916)). Just as importantly, the extension of the privilege has been limited by the majority of courts to cases in which the party or witness was participating in an unrelated litigation at the time that he was served with process in the forum state. See, e.g., ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1460 (10th Cir. 1995) (denying process immunity where party was served with process in second lawsuit while attending deposition in first lawsuit alleging similar facts); In re Fish & Neave, 519 F.2d 116, 118 (8th Cir. 1975) (similar); LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 994-95 (N.D. Ohio 1994) (applying Lamb and denying defendants' claim of entitlement to immunity based on appearance in forum state solely to contest personal jurisdiction); 4 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1080, at 511 (2d ed. 1987) ("There is generally no immunity from service of process when the suit in which immunity is sought is part of, or a continuation of, the suit for which the person claiming immunity is in the jurisdiction."); see also Lamb, 285 U.S. at 225 ("[T]he [process-immunity] privilege should not be enlarged beyond the reason upon which it is founded, and . . . should be extended or withheld only as judicial necessities require.").[9] The rationale for the differing-lawsuit prerequisite

---

[9]In their brief, defendants cite to other cases, such as American Centennial Ins. Co. v. Handal, 901 F.Supp. 892, 895 (D.N.J.1995), which interpret Lamb differently. Those cases hold that process immunity should be granted to non-residents present in the forum state to participate in any litigation, whether or not related to the suit for which the disputed service has been effected, as long as such immunity does not obstruct justice in the first suit. See, e.g., Shapiro & Son Curtain Corp. v. Glass, 348 F.2d 460, 461-62 (2d Cir.1965); NASL Marketing, Inc. v. de Vries, 94 F.R.D. 309 (S.D.N.Y.1982); United Nations v. Adler, 90 F.Supp. 440, 441 (S.D.N.Y.1950). We reject this view, as Lamb definitively retains the

(continued...)

to process immunity in this context is relatively straightforward: while a court can, in cases before it, choose to protect the jurisdictional status of a party or witness who is reluctant to come to the forum state by issuing protective orders or subpoenas, it cannot wield such power in other cases. The process-immunity exception therefore fills the gap only where it needs to be filled – that is, in cases where a district court wishes to shield an individual from service of process to encourage his or her travel to the forum state, but would be unable to do so absent the power to grant immunity.

Turning to the facts of this case, several features of defendants' litigation posture counsel against a finding that Burgar is entitled to process immunity. First, and most apparent, is the fact that defendants have never asked the district court for such immunity on behalf of Burgar, either prior to or following the hearing at which Burgar was served with process. In lieu of a specific request for immunity, defendants instead have asked this court to fashion a broad, per se rule precluding the exercise of personal jurisdiction whenever the served individual is in the jurisdiction to attend litigation-related proceedings that pertain to him or her. In light of the admonitions in Lamb and other cases that process immunity should be meted out sparingly, we reject this suggestion. Moreover, the circumstances surrounding the service of process on Burgar are not those that would ordinarily favor a finding of immunity even in a case where it had been timely requested. Specifically, Burgar voluntarily entered into Massachusetts to attend proceedings as a spectator in the same

---

[9](...continued)
distinction between presence in the forum state for related and unrelated cases. See 285 U.S. at 225 ("[T]he due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it by the service of process in other suits ....") (emphasis added).

case in which he was served with process. While we need not decide the issue, it seems apparent that under these facts, the district court would have faced a relatively heavy presumption against granting such immunity if it actually had been sought by Burgar.

For these reasons, we hold that the district court properly exercised personal jurisdiction over defendants in this case.[10] Based on this determination, we need not reach the alternate bases for personal jurisdiction discussed in the district court's opinion.

III. Plaintiff's Likelihood of Success on the Merits

Defendants' second claim in this appeal, which goes to the merits of plaintiff's suit, is that the preliminary injunction should be dissolved because it is premised on erroneous findings by the district court. Specifically, defendants claim that the court erred as a matter of fact in determining that Northern Lights manifested a bad-faith intent to profit from plaintiff's mark, and as a matter of law in concluding that ACPA should be applied retroactively to encompass defendants' behavior prior to the enactment of the statute.

A. Defendants' Bad Faith

Defendants vehemently contest the district court's finding that the registration and maintenance of the northernlights.com domain name represented a bad-faith effort to profit from

---

[10]We believe that the service of process effected upon Burgar also conferred personal jurisdiction over the other defendants. Burgar serves as the president of both Northern Lights Club, an unincorporated association, and 641271 Alberta, Ltd., a foreign corporation. See Fed. R. Civ. P. 4(h)(1) (permitting personal service of process upon officers of unincorporated associations and foreign corporations).

In all events, defendants have attacked the efficacy of service of process only in general. They have not attacked its efficacy vis-à-vis particular defendants. Consequently, we deem waived any possible argument that personal service upon Burgar was ineffectual as a means of bringing Northern Lights Club and/or 641271 Alberta, Ltd. before the court.

plaintiff's Northern Light trademark. The issue of bad faith is principally relevant to the merits of plaintiff's suit insofar as "bad faith intent to profit from [another's] mark" constitutes an essential element of the cause of action under ACPA. 15 U.S.C. § 1125(d)(1)(A)(i). In this case, however, it also relates, albeit tangentially, to plaintiff's trademark-infringement claim. This is so because the district court's finding with respect to defendants' intent in adopting the Northern Lights mark, which the court rendered while considering one of the eight factors under the "likelihood-of-confusion" test for trademark infringement, see, e.g., I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 43 (1st Cir. 1998), expressly incorporated by reference the intent findings it had made in its ACPA analysis. See 97 F. Supp. 2d at 114. Thus, we must consider the court's "bad-faith intent to profit" findings to the extent that they bear on the trademark-infringement claim. We review the district court's finding of bad faith for clear error. See American Bd. of Psychiatry & Neurology v. Johnson-Powell, 129 F.3d 1, 3 (1st Cir. 1997) (noting clear-error standard of review applies to findings of fact made in conjunction with ruling on motion for preliminary injunction) (citing Keds Corp. v. Renee Int'l Trading Corp., 888 F.2d 215, 222 (1st Cir. 1989)).

On appeal, defendants claim that their conduct did not meet the statutory guidelines for a finding of bad faith, and that even if it did, the subjective and objective reasonableness of their actions should shield them from liability. Defendants stress that their mere registration of multiple domain names does not, by itself, indicate that they were acting in bad faith with regard to any of their individual registrations or website uses. Defendants also assert that the statements of Burgar have been taken out of context by the district court, and have been unfairly used to establish Northern Lights's bad faith.

Along with its inclusion of bad faith among the essential elements of the ACPA cause of action, Congress provided nine nonexhaustive guideposts that courts may use to divine whether

or not bad faith exists. See 15 U.S.C. §§ 1125(d)(1)(B)(i)(I)-(IX). In addition, the statute provides an "escape clause" to those whose conduct would otherwise constitute bad faith if the potential infringer "believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful." Id. § 1125(d)(1)(B)(ii). In this case, the district court determined that defendants' myriad explanations for their use of the northernlights.com site – e.g., as an experimental new business model, as a site for aurora borealis admirers, and as a compilation of businesses that contain the phrase "Northern Lights" – undermined Northern Lights's claim of subjective belief in fair use, and hence their entitlement to the "escape clause" of § 1125(d)(1)(B)(ii). See 97 F. Supp. 2d at 118-19. Additionally, the court concluded that the defendants' numerous registrations of domain names containing the trademarks of others, which defendants accomplished in some cases by creating fictional "fan clubs" so that they could present a mantle of legitimacy in their registration requests to NSI, represented powerful evidence of defendants' bad faith in operating the northernlights.com site. This conclusion of bad faith was reinforced, according to the district court, by defendants' history of disregarding cease-and-desist letters from legitimate trademark owners, and their apparent openness to sell the northernlight.com registration to the plaintiff at the right price. Id. at 119-20.

Based on our review of the record, we see no clear error in the district court's finding that defendants will likely be found to have acted in bad faith in operating the northernlights.com site.[11] Although defendants are correct in asserting that their multiple registrations alone are not dispositive of the bad-faith

---

[11]The district court found that defendants' posting of a website at northernlights.com, rather than their initial domain-name registration, was the act that constituted bad-faith intent to profit in this case. See 97 F. Supp. 2d at 119 n.27.

issue, their well-established pattern of registering multiple domain names containing famous trademarks, such as rollingstones.com, evinrude.com, and givenchy.com, has been made highly relevant to the determination of bad faith by the list of factors in ACPA. See 15 U.S.C. § 1125(d)(1)(B)(i)(VIII) (noting as relevant factor "the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names"). Those facts are not clearly trumped by facts favoring defendants' side of the story, such as their use of northernlights.com as an e-mail domain name for several years prior to the dispute with the plaintiff and Burgar's initial resistance to the plaintiff's efforts to acquire defendants' domain-name registration. The district court's finding that defendants were not entitled to the "escape clause" also is not clearly erroneous; as the court found, defendants' oft-changing explanations for the purpose of the northernlights.com website evince a lack of subjective belief in the domain name's fair use.

Based on defendants' apparent modus operandi of registering domain names containing the famous trademarks of others in the hope that the famous trademark holder will be willing to pay to reclaim its intellectual-property rights, the district court reasonably concluded that defendants acted according to script in this case.[12] Accordingly, we determine that the district court did not err in finding that defendants will

---

[12]Defendants claim that since they expected no revenue stream from the content on the northernlights.com website, they could not have acted with a bad-faith intent to profit. Based on their past practices, however, it is reasonable to conclude that defendants harbored a broader, more long-term notion of "profit." Instead, defendants likely hoped to cash in on the confusion surrounding the sponsorship of the websites by finding famous trademark holders willing to pay defendants to end the diversion of Internet traffic from their website to defendants' sites.

likely be found to have acted in bad faith in operating their northernlights.com website.

B. Retroactive Application of ACPA

Defendants also ask that we review the district court's legal determination that the retroactive application of ACPA to the facts of this case is permissible.[13] After reviewing the district court opinion and the parties' briefs, however, we find it unnecessary to reach this issue, as even if we were to decide the matter in defendants' favor, it would not provide an adequate basis for dissolving the injunction. This is so because the district court expressly stated that its decision to impose a preliminary injunction rested principally upon its finding that Internet users would likely be confused by the concomitant existence of the northernlight.com and northernlights.com marks. See 97 F. Supp. 2d at 121 ("Before turning to the balancing factors, I must emphasize the importance of the likelihood of confusion findings to the preliminary injunction calculus."). Because an ACPA violation does not require a showing of likely confusion,[14] the district court's decision to

---

[13]As we recently noted in Hasbro, Inc. v. Clue Computing, Inc., 232 F.3d 1 (1st Cir. 2000) (per curiam), courts are split on the issue of whether recent Lanham Act provisions should be applied retroactively. Compare, e.g., Sporty's Farm, L.L.C. v. Sportsman's Market, Inc., 202 F.3d 489, 496-97 (2d Cir.) (concluding that ACPA should apply retroactively), cert. denied, 120 S. Ct. 2719 (2000) with Thomas & Betts Corp. v. Panduit Corp., 108 F. Supp. 2d 976 (N.D. Ill. 2000) (holding that new trade-dress provisions of Lanham Act should not be applied retroactively).

[14]As the district court noted, the "likelihood of confusion" test of trademark infringement is "more comprehensive" than the "identical or confusingly similar" requirement of ACPA, as it requires considering factors beyond the facial similarity of the two marks. 97 F. Supp. 2d at

(continued...)

enter a preliminary injunction must have been based on its resolution of the non-ACPA claims, such as plaintiff's trademark-infringement claim. In their appeal, defendants' only argument on the merits that does not impugn the district court's ACPA findings concerns the determination that Northern Lights acted in bad faith. And as we have determined in Part III.A, supra, that finding was not clearly erroneous. Thus, no matter how we might resolve the ACPA-retroactivity issue – and we expressly eschew doing so at this time – our decision would fail to affect the validity of the injunction.[15]

In sum, we conclude that defendants have identified no basis for overturning the preliminary injunction already in place. We therefore affirm its issuance by the district court.

IV. First Amendment Overbreadth of the Injunction

Defendants argue that the scope of the preliminary injunction violates the First Amendment. We need not, however, consider that issue here, for although it may have been raised below, defendants did no more than obliquely refer to the issue when the district court held the critical hearing, and subsequently took part in the framing of the preliminary injunction. Because we do not find waiver, the issue can be argued in the trial on the merits.

Conclusion

Because the district court obtained personal jurisdiction over defendants when Burgar was served with process while in the forum state, we affirm, albeit on different grounds, the court's personal-jurisdiction finding. We find no basis for

---

[14](...continued)
117.

[15]Defendants do claim that there were other "grossly unfair factual errors by the trial court" which constituted "an egregious result-driven pattern of prejudice" against them. But they have failed to specify those errors in their appellate briefs.

disturbing the court's determination of likelihood of success on the merits of plaintiff's suit, and therefore affirm those portions of the district court's opinion. Finally, while not precluding further consideration of the First Amendment issue at trial, we decline to resolve defendants' free-speech challenge to the scope of the injunction at this time.

Affirmed. Costs to appellee.

Appendix B.
United States Court of Appeals
For the First Circuit

No. 00-1641

NORTHERN LIGHT TECHNOLOGY, INC.,
Plaintiff, Appellee,
v.
NORTHERN LIGHTS CLUB, JEFFREY K. BURGAR, AND
641271 ALBERTA LTD., D/B/A NORTHERN LIGHTS CLUB,
Defendants, Appellants.

BEFORE
TORUELLA, Chief Judge,
SELYA, BOUDIN, STAHL, and LIPEZ, Circuit Judges.

ORDER OF COURT
Entered: January 30, 2001

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing en banc having been carefully considered by the judges of the Court in regular and active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
PHOEBE D. MORSE, Clerk

By: /s/ Janice M. O'Neil
Chief Deputy Clerk

cc: Messrs. Bonn, Pollack, Grimm, Gaeta, Lund

Appendix C.

Title 15, United States Code.

Sec. 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State

acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

(b) Importation

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

(c) Remedies for dilution of famous marks

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. In determining whether a mark is distinctive and famous,

a court may consider factors such as, but not limited to -

(A) the degree of inherent or acquired distinctiveness of the mark;

(B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;

(C) the duration and extent of advertising and publicity of the mark;

(D) the geographical extent of the trading area in which the mark is used;

(E) the channels of trade for the goods or services with which the mark is used;

(F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;

(G) the nature and extent of use of the same or similar marks by third parties; and

(H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(2) In an action brought under this subsection, the owner of the famous mark shall be entitled only to injunctive relief as set forth in section 1116 of this title unless the person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity.

(3) The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register shall be a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a State and that seeks to prevent dilution of the distinctiveness of a mark, label, or form of advertisement.

(4) The following shall not be actionable under this section:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and news commentary.

(d) Cyberpiracy prevention

(1) (A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person -

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that -

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18 or section 220506 of title 36.

(B) (i) In determining whether a person has a bad faith intent described under subparagraph (A), a court may consider factors such as, but not limited to -

(I) the trademark or other intellectual property rights of the person, if any, in the domain name;

(II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used,

or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

(VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c)(1) of this section.

(ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term "traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

(2) (A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if -

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c) of this section; and

(ii) the court finds that the owner -

(I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or

(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by -

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which -

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D) (i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall -

(I) expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and

(II) not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

(3) The civil action established under paragraph (1) and the in rem action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable.

(4) The in rem jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.

Appendix D.

FED. R. CIV. P. 4 Summons.

(a) Form.

The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) Issuance.

Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) Service with Complaint; by Whom Made.

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a

defendant subject to service under subdivision (h);

(B) shall be dispatch through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting

service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) Service Upon Individuals Within a Judicial District of the United States.

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is

effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country.

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in

an action in any of its courts of general jurisdiction, or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g) Service Upon Infants and Incompetent Persons.

Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by

sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(j) Service Upon Foreign, State, or Local Governments.

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(k) Territorial Limits of Effective Service.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is a subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal

law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(l) Proof of Service.

If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow a proof of service to be amended.

(m) Time Limit for Service.

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

(n) Seizure of Property; Service of Summons Not Feasible.

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.